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IN THE

Supreme Court of the United States

No. 77-244

LEE PHARMACEUTICALS,
Petitioner,

v.

DEN-MAT, INC., et al.,

REPLY MEMORANDUM OF LEE PHARMACEUTICALS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 72-244

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Respondents' opposition to the petition is largely irrelevant to any aspect of the two questions posed (Pet. 2). It is, rather, largely directed to a recitation *in extenso* of respondents' unilateral version of various details of the proceedings below that are *not raised* by the petition.

To the extent respondents' paper is at all pertinent here, it serves to emphasize the importance of the questions presented in the petition and the need for their prompt resolution by this Court. Thus respondents concede, albeit grudgingly, (Opp. 19) the existence of the pervasive Ninth Circuit practice of routinely assigning

panels of only two judges, rather than the "separate divisions, each consisting of three judges" facially required by 28 U.S.C. 46(b), to deal with cases and controversies.[1] Respondents also necessarily concede, by manifest inability to cite a case directly in point, that the questions raised are of first impression. The conflict between Ninth Circuit practice and the interpretation afforded 28 U.S.C. 46(b) by other federal courts of appeal likewise stands conceded. Hence, the need is perforce conceded for this Court to exercise its supervisory authority to insure that *all* federal courts of appeals perform their duties in a procedurally uniform, predictable and stable manner consistent with their statutory limits, so as to instill and promote public confidence in their innate fairness.

Respondents' inability to counter the petition is further apparent from their tacit concession that the questions presented therein are not answerable—a concession manifest from the *wholly different*, straw man questions respondents have first framed (Opp. 13) and then conveniently demolished. (Opp. 19-23). Thus:

(1) *Petitioner's* first question is

"1. Do 28 U.S.C. §§ 46(b) and (c) require that a panel of three judges be assigned to decide every civil case and controversy raised before a Court of Appeals, including petitions for extraordinary writs, and prohibit a Court of Appeals from assigning panels of only two judges to make such determinations?" (Pet. 2)

To divert attention from its thrust, respondents have framed an entirely *different* question 1 (Opp. 13) which they have proceeded to answer with precedent purporting to establish the propriety, in certain defined circumstances, of the disposition of a case or controversy by a quorum of only two of the appellate judges originally and properly assigned to a "separate division . . . consisting of three judges" as specified in 28 U.S.C. 46(b) (Opp. 19-21). But this point is *not* in dispute and the petition does *not* seek its examination in this Court.

[1] The pervasive nature of the practice is apparent from both the petition and its supplement.

(2) Petitioner's Question 2 is:

"2. If the answer to question 1 is "yes" and timely objection is made by an adversely affected party, may the original void two-judge decision be validated by procuring the subsequent concurrence of a third originally non-participating judge, or must a new panel of three judges be assigned to consider the case de novo?"

Obviously unable to deal with the several and varied constitutional and jurisdictional overtones of federal appellate court exercise of a power not delegated by Congress, respondents strive to deprecate the issue by posing a different, almost inanely irrelevant, self-answering question (Opp. 13) Suffice it to note that petitioner has *never* suggested it *could* or *should* have a voice in selecting the specific appellate judges to sit on its case in the court below. *Per contra*, petitioner has contended only that three appellate judges should be assigned to so sit and that each of those three should be untainted by participation in any previous, void, two-judge adjudication of the same case.

CONCLUSION

Respondents' opposition is so irrelevant and farfetched that it simply underlines the need for issuance of the writ as requested.

Respectfully submitted,

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